United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7425

ORIGINAL

To be argued by
NOEL HAUSER

In The

United States Court of Appeals

For The Second Circuit

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO, d/b/a COMO BROS., and THOMOS DEMARCO,

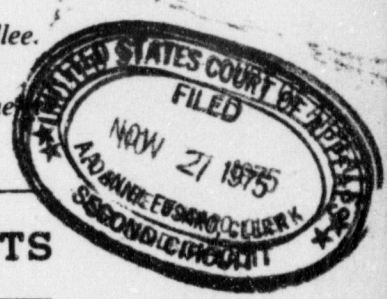
Plaintiffs-Appellants,

vs.

STANDARD FRUIT & STEAMSHIP CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southe
District of New York



BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO d/b/a COMO BROS. and THOMAS DeMARCO,

Appellants,

-against-

STANDARD FRUIT AND STEAMSHIP COMPANY,

Appellee.

Docket 75-7425

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from a Decision of the HONORABLE CONSTANCE BAKER MOTLEY, United States District Judge, dismissing the Complaint of the Plaintiffs after the Plaintiffs had rested and before the Defendant offered any proof. Sofar as is known, the Decision or Opinion is not reported.

QUESTIONS PRESENTED

1. In this action brought pursuant to the Robinson-Patman Act (15 U.S.C. 13(a) et seq.), did plaintiffs establish a prima facie violation of unlawful price discrimination on a showing of:

   (a) Repeated contemporaneous sales of bananas of like grade and quality by defendant, an importer

      (i) at consistently higher prices to plaintiffs as compared with

      (ii) consistently lower prices to the competitors of plaintiffs, defendant's favored customers

   (b) A consequent inability on the part of plaintiffs to effectively compete in the market with defendant's favored customers, and

   (c) The destruction of the business and investment of each plaintiff resulting from his inability to compete?

2. On a showing from the defendant's own records that bananas contemporaneously sold by defendant to plaintiffs and to defendant's favored customers were of the same grade and quality, were in each instance part of the same cargo, was it not the burden of the defendant to justify repeated instances of price discrimination against plaintiffs and in favor of plaintiffs' competitors; and if the burden of proof justifying price discrimination was on the defendant, could that burden have been satisfied without proof and evidence in chief from the

defendant, its agents, servants and employees?

3. In the circumstances of the relationship between the parties, did the defendant have the duty to offer "rollers" (spoiling bananas) for sale not only to the defendant's favored customers, but to plaintiffs as well?

4. To establish a cause of action based on a violation of the Robinson-Patman Act, must damages be proven with mathematical precision; and, if so, were not damages established with that mathematical precision?

5. Did the lower Court properly dismiss the Complaint after presentation by plaintiffs of their proof?

FACTS

The defendant is a leading importer of bananas. Bananas are grown in Central America, and after they are cut and harvested, they are transported by ship from Central America to the United States. Upon arrival in port, the cargo is sold to local distributors, such as each of the plaintiffs and their competitors. These distributors in turn resell the bananas to restaurants, fruit vendors, food stores, etc. Bananas are cut and harvested before they are ripe for eating so as to allow for ripening while in the process of being transported and distributed. Distributors such as plaintiff (as well as the defendant itself) maintain facilities to hasten or delay the ripening process, depending upon the available supply, as well as the demand for bananas (Deft's. Trial Memorandum, p. 4).

Plaintiffs, of course, recognize that there are different grades and qualities of bananas, although the classes are not as numerous as defendant claims.

Plaintiffs also recognize that there is no such thing as price discrimination established by comparing prices charged at simultaneous times of bananas of different classes or grades. On the contrary, plaintiffs' EXHIBIT "2" (389a-596a) which is a reproduction of the defendant's own sales records, establishes approximately two hundred instances when the defendant charged higher prices for bananas sold to the plaintiffs as opposed to bananas sold to other customers of defendant; and as to each instance established on each page (389a-596a) the type of banana in each instance referred to by the defendant's own records is identical. Thus, there is no question but that in each instance when price discrimination is charged, the proof of the plaintiffs concerns itself with bananas which are identical in grade and quality according to the defendant's own records.

Defendant concedes, as it must, that it charged different prices at virtually identical times for bananas of like grade and quality of different customers. In fact, defendant concedes that apart from

so-called "promotional activity", it charged its customers on the basis of anyone of three different established prices, to wit:

(a) the "seaboard" price;

(b) the "reduced" price; and

(c) the "roller" price.

These concessions are found in the Pretrial Order setting out the position of the defendant on liability (18a, 19a), as well as in the defendant's Memorandum of Law to the Trial Court, wherein the following is stated:

> "Throughout the period in question, defendant's procedure with respect to pricing bananas was as follows: defendant would receive information from the point of origin of bananas a couple of weeks in advance. Such information included, inter alia, the expected dates of arrival of vessels, stowage arrangements, and the quantity and variety of bananas contained on the vessel. Defendant would review and analyze market conditions and determine an asking price for the bananas for shipments arriving on each expected vessel the following week. These prices were known as the 'seaboard' prices and were the basis for accepting orders for bananas by defendant's various sales offices for the

following week.

> "After the seaboard price is established, supply, demand, weather conditions, a cheap seasonal supply of competitive fresh fruit other than bananas, and other market conditions affecting bananas often resulted in price fluctuations off the seaboard price. Consequently, defendant frequently reduced its asking price for bananas arriving on a particular vessel between the time the seaboard prices were established and the commencement of discharge of a vessel.
>
> * * *
>
> "Despite its sales efforts, defendant would, from time to time, not have orders for all bananas on a particular vessel prior to discharge of the vessel. Nevertheless it was imperative for each vessel that each vessel be discharged promptly because of the perishability of the bananas and to free up the ship or pier for future shipments. Bananas remaining unsold after a vessel was discharged were loaded into trucks and became known as 'rollers'." (Underscoring added).

The proof on the trial established, and the Trial Court found as a fact, that plaintiffs placed their orders in advance of the arrival of the ship in port, and that the defendant accepted such orders at the seaboard or highest price (599a). This finding of fact is

not challenged by the plaintiffs herein.

The lower Court also found as a fact, that the defendant sold bananas to competitors of the plaintiffs at prices which were "reduced" below the seaboard price charged of the plaintiffs (600a). The lower Court found as a fact, that this came about because the defendant's favored competitors of the plaintiffs could afford to wait until the defendant "reduced" its prices below the seaboard price (600a). The plaintiffs do not challenge as erroneous so much of this finding of fact as concludes that the plaintiffs' competitors were able to purchase bananas from the same ship at prices lower than those charged of the plaintiffs; however, the plaintiffs do challenge so much of the finding as concludes that it came about because of the fact that the favored competitors were able to wait until the defendant reduced its prices (600a). If, as the lower Court found, the favored competitors of the plaintiffs were able to purchase bananas at prices lower than those being paid by the plaintiffs, the justification for charging a

lesser price of the favored competitors was upon the defendant and the complaint was dismissed before the defendant offered any proof whatever. In any event, however, and even assuming that the lower Court's entire analysis of the facts as established were to be accepted, the question nevertheless remains whether the conclusion of law drawn is proper, that is, did the defendant have the right to reduce prices for bananas in order to stimulate sales after having sold large quantities of bananas of the same grade and quality to the plaintiffs at a higher price? (See quotation from defendant's trial brief, supra, pages 6-7). Concededly, defendant would have been justified in reducing its prices if the bananas were in imminent danger of spoilage, but the defendant did not contend, and the lower Court did not find that the price discrimination in all cases, or even in most cases, came about because the fruit owned by the defendant at a given point in time was in imminent danger of spoilage. On the contrary, defendant was itself unable according to the Pretrial Order, to do more than to

suggest that the price differences came about as a result of any number of different reasons, but the defendant was unable to establish which alleged reason applied to which discriminatory sale (18a, 19a). Moreover, since the complaint was dismissed at the close of the evidence offered in behalf of the plaintiffs, no evidence of justification for price discrimination was offered in behalf of the defendant.

The lower Court found as a fact, that plaintiffs failed to show any connection between the loss of their customers and the loss of their sales or that any of it came about as a result of the fact that their competitors were selling the self-same bananas at reduced prices. The proof on this issue in favor of the plaintiffs was however offered and received, and the lower Court had no right to disregard the same in order to justify a dismissal of the complaint, thus in effect relieving the defendant of the burden of establishing that the conceded discriminations in prices were, in fact, lawful and not unlawful.

Finally, plaintiffs urge and argue that the finding of fact and conclusion of law of the Trial Court that plaintiffs failed to show any actual damages is clearly erroneous as a matter of law (603a). In arriving at this conclusion, the lower Court quite evidently relied upon earlier decisions of this Court dealing with the so-called "passalong" defense to the damage aspect. Since the passalong defense has been disapproved of by the United States Supreme Court, it would appear that the lower Court's reliance upon an earlier decision of this Court is misplaced.

ANALYSIS AND ARGUMENT

The basic provisions of the Robinson-Patman Law are violated when a vendor of goods, engaged in interstate commerce, sells goods of like grade and quality to two or more vendees in substantially contemporaneous transactions, at prices or on terms which discriminate in favor of one buyer and against the other buyer; where the seller is unable to point to justification for his discriminating in favor of one as against the other under the statutes; where in consequence of the foregoing, there has been an injury to competition; and where the disfavored buyer is able to establish that he has suffered injury and damage as a consequence. Continental Baking Co. v. Old Homestead Bread Co., 476 Fed. 2d 97 (C.A. 10, 1970), cert. denied 414 U.S. 975, 38 L. Ed. 218, 94 S. Ct. 290.

There can be no doubt but that the proof submitted in behalf of the plaintiffs establish that the defendant sold bananas of like grade and quality (a) to

plaintiffs at a higher price, and (b) to plaintiffs' competitors at a lower price. Examination of each and every comparison of sales taken from the books and records of the defendant itself will establish that the plaintiffs paid a higher price of a given quality of bananas on most given occasions than did other of the defendant's customers purchasing the same quality bananas at substantially the same time from the same ship (389a-596a). If there be any doubt that the price discrimination occurred, the doubt may be dispelled by an examination of the Pretrial Order pursuant to which the defendant expressed an intention to establish that there was a statutory justification for the price discriminations which the defendant was aware the plaintiffs were in a position to establish (18a, 19a).

The fact that the defendant sold bananas of like grade and quality in substantially contemporaneous transactions, but at different prices, to the plaintiffs on the one hand, and to the defendant's favored customers on the other, is but one of the

elements necessary to establish a violation of the basic provisions of the Robinson-Patman Act, 15 U.S.C. 13(a). The other elements are proof of competitive injury and damages; provided, however, that even if all of the elements are established, the defendant may escape liability by establishing the facts or the events which the Statute in question declares to justify price discrimination which would otherwise be illegal. However, since the complaint was dismissed at the close of the testimony offered in behalf of the plaintiffs, there was no occasion for the defendant to establish a statutory justification for its conduct, and none was in fact established, unless it may be said the defendant was able to establish to the satisfaction of this Court that it proved through the cross-examination of the witnesses who testified for the plaintiffs, that there was a statutory justification for the price discrimination complained of.

In this connection, it is perhaps instructive to refer to Patman, A Complete Guide to the Robinson-Patman

Act (1963), who states at page 88:

> "Whenever anyone relies on this proviso, [authorizing a price discrimination where there is actual or imminent deterioration of perishable goods], the burden of proof is on him to show that the conditions designated in the proviso can be satisfied by the facts and circumstances involved in the particular case of discrimination."

In the same work, the author states at page 89:

> "In all such cases, the burden of proof remains upon the seller to establish the necessity for such action. He must be prepared to defend himself against an accusation of unlawful discrimination by showing the justification for his acts within the limitations provided by this proviso."

Plaintiffs concede that if bananas imported by the defendant were actually or in imminent danger of deterioration, the defendant would have been justified in reducing the price. However, according to that portion of the Brief submitted by the defendant to the Trial Court below, and quoted supra, pages 6-7, it was the practice of the defendant to reduce the price of bananas in two

stages: the first stage was for the purpose of stimulating customers to purchase bananas as opposed to other fruit, and the second stage, which came about when the bananas had reached that point of ripeness when they could no longer be safely held for sale, they were sold as "rollers" at dramatically reduced prices at a time when the bananas were, in fact, in actual or imminent danger of deterioration.

Concededly, the statute authorizes price discrimination by a common vendor who reduces his price to meet the price of a competing vendor (primary line competition) but there is absolutely no proof that defendant's discriminatory pricing practices were the result of primary line competition nor did the lower Court make any such finding.

Thus, to escape liability by arguing to this Court that it established a right to engage in price discrimination authorized by the statute, the defendant would have to satisfy this Court that through the cross-examination of the witnesses who testified for the

plaintiffs, it established that every price reduction was justified, because every banana whose price was reduced was about to spoil or deteriorate. Obviously, this information was and is solely within the knowledge of the defendant, its agents, servants and employees, none of whom testified upon the trial of this action; and moreover, the defendant itself does not even claim that every instance of price discrimination was justified on these grounds.*

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* The attention of this Court is invited to United Banana Co. v. United Fruit Co., 245 F. Supp. 161 (D. Conn. 1965) aff'd, 362 F. 2d 849 (C.A. 2, 1966), mistakenly relied on by the Court below (603a). There, as here, defendant was a banana importer and plaintiff a distributor. The plaintiff there alleged a Robinson-Patman violation in connection with an alleged discriminatory truck loading surcharge. The District Court opinion is significant here only in that it points out that the defendant there, which also quoted "seaboard prices" for bananas in the first instance, followed the practice of reducing prices (if at all) "across the board"; those customers who placed their orders first and consequently agreed to pay the "seaboard price" enjoyed the benefit of price reductions subsequently fixed by the defendant so that all of its customers paid the same price. That is precisely the converse of the practice of the defendant here, which granted price "reductions" (footnote continued)

The statutory defense of price discrimination as justified under the statute was not established, and was not even claimed to have existed by the defendant in every instance where price discrimination was shown to have occurred.

There thus remains the simple inquiry as to whether the plaintiffs established an "injury to competition" within the meaning of the statute, and whether they established damages sustained by them in consequence of the acts of the defendant. We respectfully submit that both on the facts and on the law, plaintiffs established, prima facie, each of these elements.

(footnote continued)

as to prospective purchasers only, that is to those who "could afford to wait until prices were reduced" (600a). This is precisely the evil intended to be overcome by the Robinson-Patman Act; moreover, it is ironic that if plaintiffs followed the practices of defendant's favored competitors, that is, collectively refusing to buy until prices became attractive, they might subject themselves to a claim of violation of the Sherman Act, 15 U.S.C. 1.

There was testimony in behalf of the plaintiffs that based upon the price which they were paying for bananas, they were offering to sell bananas to their customers at prices which were higher than the customers had paid for the same bananas purchased from defendant's favored competitors, Russo & Loi (56a-60a; 314a-318a). These were, of course, not isolated instances, but rather weekly occurrences which, as the testimony established, prevented each of the plaintiffs from effectively competing for a fair share of the wholesale banana business, as a result of which the plaintiffs, Como and DeMarco, were forced out of business entirely (197a, 198a-206a; 313a-316a) and the business of the plaintiff Lombino suffered to such an extent that from employing 10 people in 1967 (79a), it only required the services of approximately two people in 1972 (87a), suffering enormous losses and profits and loss in investment along the way (90a-94a).

Concededly, plaintiffs did not offer proof that the price of bananas to the consuming public generally

increased or decreased during the period in question as a result of the conduct of the defendant. Not even the lower Court took so strict a view of the proof required of a Robinson-Patman plaintiff; of course, no such proof is required. Continental Baking Co. v. Old Homestead Bread Co., supra; Enterprise Industries v. Texaco, Inc., 240 Fed. 2d 457 (C.A. 2, 1957).

What seems to be required to satisfy the "injury to competition" requirement of the statute is either facts from which injury to competition may be inferred or, alternatively, injury to the Robinson-Patman plaintiff himself.

Patman, A Complete Guide to the Robinson-Patman Act (1963) at page 61 cites Radiant Burners Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) as holding that injury to the Robinson-Patman plaintiff, as opposed to injury to competition generally is all that is required. While Radiant Burners Inc. was, admittedly, a Sherman Act case, Patman argues that its rationale applies to Robinson-Patman Act cases, quoting from the

Congressional Report on the Patman Bill (H.R. Rep. 2287, 74th Congress, Second Session, 8, 1936), that the immediately important concern to the framers of the legislation was to redress "injury to the competitor injured by the discrimination" rather than "general injury to competitive conditions".

If one were to disregard the dictum of Patman, the architect of the Robinson-Patman Act, and insist that an injury to general competitive conditions is required in order to establish a violation of the Robinson-Patman Act, it is nevertheless respectfully submitted that that standard of proof is more than met by the proof in this case, establishing that of the three wholesale banana distributors who are plaintiffs in this case, two were forced out of business together, and the business of a third was reduced by about 75% measured according to any standard, and that all of this occurred during the critical period.

It has been held that "injury to competition" within the meaning of the Robinson-Patman Act may be

proven by the concurrent adverse experience of several disfavored buyers (loss of ability to resell) during a period of activity which allegedly violated the statute. American Can Co. v. LaDoga Canning Co., 44 F. 2d 763 (C.A. 7, 1930), cert. denied 282 U.S. 899, 75 L. Ed. 792, 51 S. Ct. 183.

Alternatively, the Courts have had wide experience in and have long recognized that in the area of food distribution, the most minor price changes can have an enormous impact among vying competitive forces in the marketplace. See, e.g., Continental Baking v. Old Homestead, supra, where a prohibited one cent price reduction on bread loaves led to a verdict in excess of one million dollars before trebling, as well as cases therein cited. Particularly in those cases where the commodity which has been the subject of price discrimination is food, the Courts have freely inferred the fact of competitive injury from the mere showing of price discrimination. (Foremost Dairies v. F.T.C., 348 F. 2d 674 (C.A. 5, 1965); Beatrice Foods v.

F.T.C., Docket # 8663 (1969)).

Here, the Court need not use the "inference" technique, because there is ample proof in the Record that the plaintiffs could not effectively compete with the defendant's favored customers who were able to purchase bananas, and consequently to sell bananas, at a price advantage of approximately fifty cents over the plaintiffs, who were vying to sell bananas to the self-same customers. As above pointed out, the business of each of the plaintiffs was either enormously reduced, or ceased entirely.

The strongest argument in this Record which could be made by defendant in support of affirmance is in urging that the damages were not proven because plaintiffs apparently attempted to sell their bananas at higher prices than their competitors, reflecting the higher prices plaintiffs were paying as compared to the prices being paid by their competitors. The "choice" of the plaintiffs was to either reduce their prices to those of their competitors favored by the defendant,

thus reducing the profit margin to a point where plaintiffs would be selling bananas at a loss, or to insist on "passing along" the higher price which plaintiffs were paying, in which event the customers of the plaintiffs would necessarily eventually gravitate to the favored customers of the defendant who could provide bananas of equal grade and quality at a consistently lower price. Because the plaintiffs chose the latter of the two alternatives available, the defendant urged upon the lower Court that plaintiffs had suffered no damage since the increased costs which they were paying for bananas had been "passed along" to their customers (see pages 32-36 of the Trial Memorandum of the defendant in the Court below , and the discussion of the Decision by this Court in Enterprise Industries v. Texaco, Inc., 240 F. 2d 457 [C.A. 2d 1957; cert. denied 353 U.S. 965 (1957)].

The "pass along" defense which was adopted by this Court in the Enterprise case had earlier been rejected by the Second Circuit, in Straus v. Victor

Talking Machines (C.A. 2, 1924) 297 Fed. 791. In the Straus case, it was urged upon this Court that plaintiff had suffered no damage because the increased costs for merchandise with which it was saddled as a result of the acts of the defendant and which violated the Anti-Trust Laws, may have been passed along to the customers of the plaintiff. This Court rejected that argument, taking the position that the most direct damages sustained by the plaintiff was the difference in price between what plaintiff should have been required to pay for the products of the defendant and what the plaintiff was, in fact, required to pay for the products of the defendant because of the prohibited acts of the defendant, and this independently of whether the plaintiff had been able to "pass along" the increased costs to any of its customers. In the Straus case, the Court was at pains to point out that the plaintiff was not required to ask for or to prove loss of profits which it otherwise would have made, but rather its costs illegally increased; and that that fact alone justified

an award of damages in the amount of the increased costs.

The decision by this Court in the Enterprise case did not follow the rationale in Straus v. Victor Talking Machine Co., supra, but rather held that unless the plaintiff could prove that there had been no "pass along" of the increased costs for the product which was thrust upon the plaintiff, there could be no recovery.

The "pass along" argument on the issue of damages which was adopted in the Enterprise case was rejected in Fowler v. Gorlick (C.A. 9, 1969), 415 Fed. 2d 1248, cert. denied 396 U.S. 1012, 90 S. Ct. 1071, 24 L. Ed. 2, 503. The "pass along" argument to the question of damages adopted by this Court in the Enterprise case has apparently also been rejected in Hanover Shoe v. United Shoe Machinery Co., 392 U.S. 481, 81 S. Ct. 2224, 20 L. Ed. 1231 (1968).

The following language of the United States Supreme Court, quoted from page 489, seems apposite:

> "If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages.

The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower, his profits would have been higher. It also seems clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he 'takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.'"

CONCLUSION

THE JUDGMENT OF THE LOWER COURT DISMISSING THE COMPLAINT SHOULD BE REVERSED; THE COMPLAINT SHOULD BE REINSTATED AND A NEW TRIAL DIRECTED.

Respectfully Submitted,

RICHARD J. SGARLATO and
HAUSER & ROSENBAUM, P.C.
Attorneys for Appellants

Dated: New York, New York

November 17, 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

LOMBINO & SONS, INC.
Plaintiffs- Appellants,

- against -

STANDARD FRUIT & STEAMSHIP CO.,
Defendant- Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 21st *day of* November *19* 75 *at* 1 Chase Manhattan Plaza *upon deponent served the annexed* Brief

Milbank, Tweed, Hadley & McCloy

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 21st *day of* November *19* 75

Robert I. Brown

ROBERT I. BROWN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE